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7-1-2004

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Recommended Citation

Harold Hongju Koh, *The Right Stuff*, 58 U. Miami L. Rev. 969 (2004)
Available at: <http://repository.law.miami.edu/umlr/vol58/iss4/7>

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The Right Stuff

HAROLD HONGJU KOH*

"You don't need many heroes if you choose carefully." With that dedication to Earl Warren, John Hart Ely began *Democracy and Distrust*,¹ and with that dedication to John Hart Ely, I begin this tribute.

John was my teacher long before he was my friend. I really met him twice, at very different times in my life. I met him first, in print, 27 years ago, when I was a first-year student at Harvard Law School. It was mid-December and I was struggling to understand the doctrine of *Erie R.R. Co. v. Tompkins*,² and how it applied to a case called *Hanna v. Plumer*.³ After looking at a few turgid hornbooks, and wondering why on Earth I was in law school, I ran across an article in the *Harvard Law Review* called "The Irrepressible Myth of Erie."⁴ "The ones I feel sorry for," John confided, "are the people who bought the federal evidence tapes." And with those words I was hooked.

John was the first legal scholar who really spoke to me. I started reading John Ely like some people read John Grisham. In short order, I had devoured his *Yale Law Journal* pieces on *Roe v. Wade*⁵ and *Legislative and Administrative Motivation in Constitutional Law*.⁶ I read his classics on flag desecration,⁷ the bill of attainder clause,⁸ and reverse discrimination.⁹ As a second-year student, I stayed up all night chuckling over *Democracy and Distrust*, understanding for the first time what constitutional law and legal scholarship were all about.

Those of you who have read Tom Wolfe's *The Right Stuff*¹⁰ know that "anyone who travels much on airlines in the United States soon gets

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1. JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980).

2. 304 U.S. 64 (1938).

3. 380 U.S. 460 (1965).

4. John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693 (1974).

5. John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973); *Roe v. Wade*, 410 U.S. 113 (1973).

6. John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970).

7. John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975).

8. John Hart Ely, Note: *The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause*, 72 YALE L.J. 330 (1962).

9. John Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723 (1974).

10. TOM WOLFE, *THE RIGHT STUFF* (1979).

to know the voice of The Airline Pilot . . . coming over the intercom with a particular folksiness" that evokes the voice of Chuck Yeager, the greatest fighter pilot of all time. Well, anyone who reads law likewise hears in every author the voice of John Hart Ely, the greatest legal writer of our time, the man who set the cadence for two generations of legal scholars.

As I read John's articles, I naturally became more curious about John the man. I soon learned that John was not just an ivory-tower academic; he also enjoyed one of the greatest lawyerly careers of our time: from his days as a law student researching Abe Fortas' brief in *Gideon v. Wainwright*,¹¹ to his service as a law clerk to Chief Justice Warren working on *Griswold v. Connecticut*,¹² to his time as member of the Warren Commission staff, to his years as a San Diego public defender and general counsel of the Department of Transportation, where he argued and won landing rights for the Concorde, (an airplane that fittingly, stopped flying the very week that John died).

When you get to know someone so well from afar, it's pretty intimidating to get an actual letter from your hero. And so I was stunned, as a young law professor in 1989, to get a note in that beautiful, angular handwriting telling me that John Hart Ely had enjoyed an article of mine, and that maybe we should talk sometime. Trembling, I called his phone number and heard this message. "**Call Me Voicemail!** This is John. Ely. But you knew that. I'm not here. But you knew that too. Or maybe I'm avoiding you." **BEEP**. No one did voicemail like John.

When I finally reached him, we talked about his haunting book, *War and Responsibility*,¹³ a remarkable expose of the lessons of the war in Indochina. Written after he finished his term as Dean of Stanford Law School, that remarkable book reminds me — helpfully now — that there can still be scholarship after deanship. Soon we were working together on a law professors' amicus brief challenging the constitutionality of the first Gulf War. Calling in from various hotels in Eastern Europe, John left me voicemails that made me howl. For example: "Here I am in Prague, the Czech Republic. Like Diogenes, I am searching for an honest man. I just ate a \$50 breakfast at the Hilton, so I don't think he's here. Maybe he's in Warsaw."

And so I had the lucky chance so many people never get: actually to become friends with your boyhood hero. When we finally met in

11. 372 U.S. 335 (1963).

12. 381 U.S. 479 (1965).

13. JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* (1993).

person, during his year of visiting at Yale, we got to be friends surprisingly fast.

It was pretty easy, really. I knew everything about John, and so did he, so we had a lot to talk about. We went to minor league baseball games. We laughed about everything. And we talked about movie trivia, lots of it. "What is the best movie fight scene on a train?" he once asked. And then he answered his own question: "*From Russia with Love*. Definitely. *From Russia with Love*."

When he moved down here to Miami, my family came to visit. Together, we saw the Asian elephants at the Miami Zoo, and we toured the Parrot Jungle. When asked why he moved to Miami, he answered like Bogart in *Casablanca*: "I came for the scuba diving," he would say, although in fact he rarely dove. The truth is that he stayed because of his Miami friends, many of whom are here today, and especially because of Gisela, whom he met and married, who loved him last and best, and who cared for him until the very end.

After John got sick, our talks got more serious. Behind his cool exterior, I saw his vulnerability, his intense loyalty, his touching patriotism. I saw that this Yankee WASP had a deep empathy for ethnic underdogs; it was not for nothing that he wrote about judicial protection of discrete and insular minorities. "Why do you always use your middle name?" I once asked him. "Because if I called myself "John E. Lee," everyone would think I was Asian, like you," he shot back.

Even while undergoing the most painful cancer treatments, he never lost his edge. On the day he received his honorary degree from Yale, which called him the greatest constitutional scholar of our time, he was in excruciating pain. After the ceremony, a number of my colleagues came to my house to visit John. Before long, they were telling John what they had written about him in their letters recommending him for the honorary degree. "In my letter," said one, "I wrote this." "In mine, I wrote this." John gave me a painful smile. "You should have seen *my* letter," he whispered.

During our last visits, at a New York hospital and at his home in Miami, John told me he was glad I was becoming Dean of Yale Law School, where he had first studied and taught, and where he first fell in love with the law. Yale was the school that had shaped him the most and that he loved the most. Standing under a tree, he told me, "You know what? I like New Haven. My best friends are here. Why did I ever leave?"

Because, I thought to myself, you were restless. Because you were a maverick. Because you were fiercely independent. And maybe, just maybe, because you did not realize how much we loved you.

When Denny Curtis, Bob Gordon, and I came down to Miami for John's funeral we found him lying in his coffin, wearing a Yale Law School necktie. At his fortieth law school reunion, held just a few days after his death, all his classmates could talk about was John. One classmate recalled a day early in their first year of law school when a professor asked John a hair-splitting question. Unafraid, John answered, "I'm sorry. I don't play word games."

That was the John Ely I knew. The honest scholar. The fearless activist. The passionate friend. No wonder that John never found his honest man. The truth is that the honest man that Diogenes searched for with his lamp was John Ely himself.

In the end, the ones *I* feel sorry for are those people who never got to meet John in person. But just think, even as I speak, there is a college kid or law student somewhere who is opening up *Democracy and Distrust* for the very first time. And for that student, John Hart Ely is not just a memory. In those pages, he is just as alive, just as cool — just as full of the right stuff — as he was for me, so many years ago and always.